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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN BRUCE PERRY, Defendant and Appellant.	A104398 (Lake County Super. Ct. No. CR033930)

I. INTRODUCTION

Appellant pled guilty to one count of what was originally a six-count complaint filed against him in Lake County Superior Court. That count charged the infliction of corporal injury to a cohabitant resulting in a traumatic condition. (Pen. Code, § 273.5, subd. (a).).[1] Appellant was sentenced to the upper term of four years in prison and ordered to pay certain statutory fines. Appellant filed both a timely notice of appeal and a request for a certificate of probable cause. The trial court which sentenced him granted the latter. His appellate counsel then filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 asking that we independently review the proceedings below. We conclude that in sentencing defendant, the trial court relied on factors that must under *Blakely v. Washington* (2004) __U.S. __ [124 S.Ct. 2531] (*Blakely*), be submitted to the jury. Accordingly, we remand this matter for resentencing.

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

On June 27, 2003, Lakeport police were dispatched to the home of appellant and his wife and family on Todd Road following the hang-up of a 911 call. While enroute, the officers were told by their dispatcher that there had been three more such calls, during some of which sounds of an argument could be heard. The officers were met by Jennifer Marconi, who told them that her godmother, appellant's wife Michelle, had been assaulted by appellant. Upon arriving at the residence, the officers noted that its front door had apparently been kicked in; some debris blocked one of the front steps.

The police soon determined that appellant had left his residence when he saw the police arriving. The officers interviewed Michelle, appellant's wife, who was crying, obviously quite upset over what had gone on previously, and also appeared hurt. She had dried blood on her lip where, she said, appellant had struck her. She further told the officers that appellant had been drinking during the day and, after returning from a trip to the store with Marconi, had gotten into an argument with his wife. That argument resulted in appellant yelling at her and throwing various items around. Michelle then told appellant to leave the house, but he then slapped her across the mouth, grabbed her, and knocked her to the ground. Michelle tried to call the police, but appellant kept ripping the phone away from her. She was eventually able to get appellant out of the house, lock the doors, and complete her call to the police. Then appellant returned, started tearing up the front porch and ramp, and kicked in the front door to regain entry. At that point, Michelle put down, but did not hang up, the phone. Appellant was by then carrying a .22 caliber rifle and began walking around the house pointing the rifle at his wife as he continued to berate her. When Michelle told appellant she had called the police, he put the rifle down and left the house again.

Michelle told the officers that this was not the first time appellant had hit her and that several other such incidents were a matter of record in Sonoma County. She also

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2 This (abbreviated) statement of facts is taken from the probation report, as no preliminary hearing was held in this case.

told the officers that she did not permit appellant to stay overnight in the house because she did not trust him and was afraid of him.

The officers also spoke with Michelle and appellant's three-year old son who told them he had seen "his daddy being mean to his mommy."

On July 1, 2003, appellant was charged with six counts, four being felonies (violations of §§ 459, 273.5, subd. (a), 136.1, subd. (b)(1), 12021, subd. (c)(1)) and two being misdemeanors (§§ 417, subd. (a)(2) and 603). Two days later, appellant entered a plea of not guilty to all counts.

On July 18, 2003, the date set for appellant's preliminary hearing, appellant changed his plea to guilty to count two (the charged violation of section 273.5, subdivision (a)) in exchange for an outright dismissal of one felony count, and dismissal of the others albeit with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754. In the course of accepting this plea, the court gave appellant all the requisite advice concerning the consequences of it and elicited the appropriate waivers. Appellant then pled guilty to count two and the court accepted that plea.

On August 18, 2003, and consistent with the probation department's recommendation, the court denied appellant probation. The court set forth several specific reasons for so doing, including the "nature, seriousness and circumstances of the crime," and the fact that appellant was armed, that he inflicted injury "both physical and emotional" on his wife, the victim, that he "took advantage of a position of trust to commit the offense," that his prior convictions "are numerous and increasing in seriousness," and that his prior performance on probation "has been poor." The court then found that the circumstances in aggravation outweighed any in mitigation, and imposed the upper term of four years in state prison, restitution and parole revocation fines, and gave appellant a total of 73 days of custody credits.

Appellant filed a timely notice of appeal and also a request for a certificate of probable cause, which the trial court later granted.

III. DISCUSSION

Appellant's application for a certificate of probable cause states that the Lake County District Attorney had told his "court appointed attorney that if I would plead no contest to PC 273.5 that they would drop all other charges they filed against me and would recommend to Judge probation; . . . Instead they recommend max. sentence to probation dept. report and max. sentence to Judge A.H. Man [sic] and use the charges that they drop to persuade Judge A.H. Man [sic] to lean toward max. sentence."

In point of fact, the record is to the contrary. At the time the court accepted appellant's guilty plea to the one count of violating section 273.5, subdivision (a), the court and appellant had the following explicit dialogue:

"THE COURT: Do you understand that you will be sentenced in this matter based in part on a report and recommendation that will be prepared by the probation department?

"THE DEFENDANT: Yes, sir.

"THE COURT: And you understand that at this time no promise is being made as to what your eventual sentence in the case might be?

"THE DEFENDANT: Yes, sir. . . .

"THE COURT: Are you pleading guilty to count two because you are in fact guilty of the conduct set forth in that count?

"THE DEFENDANT: Absolutely."

It is, of course, axiomatic, that a guilty plea waives any irregularity in the proceedings which would not preclude a conviction. "Thus irregularities which could be cured, or which would not preclude subsequent proceedings to establish guilt, are waived and may not be asserted on appeal after a guilty plea." (*People* v. *Turner* (1985) 171 Cal.App.3d 116, 126.)

The trial court imposed the upper term of four years. We conclude this sentence violates *Blakely, supra,* __ U.S. __ [124 S.Ct. 2531].

In *Blakely,* the Supreme Court held that a Washington State court denied a criminal defendant his constitutional right to a jury trial by increasing the defendant's

sentence for second-degree kidnapping from the "standard range" of 49 to 53 months to 90 months based on the trial court's finding that the defendant acted with "deliberate cruelty." (*Blakely, supra*, __ U.S. __ [124 S.Ct. at p. 2537].) The *Blakely* court found that the state court violated the rule previously announced in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) that, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely, supra,* __ U.S. __ [124 S.Ct. at p. 2536].) In reaching this conclusion, the court clarified that, for *Apprendi* purposes, the "statutory maximum" is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Ibid*.)

In this case, the trial court imposed the aggravated term based on the following factors: (1) "the defendant was armed with or used a weapon at the time of the commission of the offense;" (2) "the defendant has engaged in violent conduct which indicates he's a danger to society;" (3) his prior convictions as an adult are numerous and of increasing seriousness;" (4) "he was on a grant of summary probation at the time this crime was committed;" (5) "the defendant's prior performance on summary probation has been unsatisfactory." Because under *Blakely*, at least four of these five factors must be determined by a jury, we conclude the trial court erred.

The *Blakely* court rested its holding on *Apprendi* and, therefore, we apply the *Chapman* standard of prejudice applicable to *Apprendi* errors to the trial court's error here. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Under this test, we are required to reverse unless the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) We cannot conclude, beyond a reasonable doubt that a jury would have made the requisite findings of these aggravating factors had the matter been submitted to them as *Blakely* requires.

The trial court also relied on one recidivist factor in imposing the aggravated term, namely that defendant's prior convictions are numerous and of increasing seriousness. It is not clear whether this factor is a "fact of a prior conviction" which need not be

submitted to the jury (see *People v. Thomas* (2001) 91 Cal.App.4th 212, 216-223) or whether it involves a sufficiently subjective analysis so as to require a jury finding under *Blakely*. Should the former be the case, the trial court appropriately may rely on this single factor in aggravation to support imposition of an upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433; see also *People v. Kelley* (1997) 52 Cal.App.4th 568, 581; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360; *People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) "[I]n order to determine whether error by the trial court in relying upon improper factors in aggravation requires remanding for resentencing 'the reviewing court must determine if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* [(1956)] 46 Cal.2d [818, 836].)' [Citations.] However, '[t]he statutory preference for imposition of the middle term, when coupled with the requirement that aggravating circumstances must outweigh mitigating circumstances before imposition of the aggravated term is proper, creates a presumption.' [Citation.] Thus, the reviewing court may not simply ask whether the imposed sentence would be 'wholly unsupported or arbitrary in the absence of error' but must also reverse where it cannot determine whether the improper factor was determinative for the sentencing court. [Citation.]" (*People v. Avalos* (1984) 37 Cal.3d 216, 233.)

We need not decide whether the trial court (rather than the jury) may, after *Blakely*, find that defendant's crimes were of increasing seriousness, because we cannot determine, from this record, whether the four improper factors were "determinative" for the trial court. To put it another way, we cannot determine whether the trial court would have imposed the upper term based solely on defendant's increasing criminality.

Our review of the record indicates that the trial court imposed the aggravated term after balancing numerous aggravating factors against a single factor in mitigation (that defendant "voluntarily acknowledged wrongdoing at an early stage of the criminal process." There is nothing in the record indicating whether the trial court's determination was based primarily on the sheer number of aggravating factors present in this case. Nor is it clear what weight the court assigned to the single mitigating factor and whether this

weight would offset the weight the court assigned to the defendant's increasing criminal conduct. In the absence of such information, we must reverse defendant's sentence and remand this matter to the trial court for resentencing in light of *Blakely*.

IV. DISPOSITION

The matter is remanded for resentencing in light of *Blakely, supra,* __ U.S. __ [124 S.Ct. 2531].

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Haerle, J.

We concur:

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Kline, P.J.

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Lambden, J.